



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

October 27, 1989

Mr. Valgene Massey
Assistant City Attorney
Brownsville City Hall
P. O. Box 911
Brownsville, Texas 78520

Open Records Decision No. 533

Re: Whether section 9a of article 8307, V.T.C.S., protects workers' compensation claim reports in the custody of a city from required public disclosure under article 6252-17a, V.T.C.S. (RQ-1810)

Dear Mr. Massey:

The City of Brownsville received a request from a journalist for a copy of the first injury report that the city filed with the Industrial Accident Board in connection with the worker's compensation claim of a police officer who was injured on duty. The city seeks to withhold the injury report from required public disclosure under sections 3(a)(1) and 3(a)(3) of the Open Records Act.

Section 3(a)(1) protects information deemed confidential by law, including statute and judicial decision. The specific question here is whether information contained in the first report of injury or illness is deemed confidential by section 9a of article 8307, V.T.C.S., such that it is excepted from disclosure under section 3(a)(1) of the Open Records Act. Subsection (a) of section 9a provides that

Information in a worker's claim file is confidential and may not be disclosed except as provided in this section.

V.T.C.S. art. 8307, § 9a(a).

The legislative background to section 9a is informative. Section 9a was added to article 8307 in 1977 in response to Open Records Decision No. 8 (1973) and the Texas Supreme Court decision in Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977), in which the court

held that claim information in a worker's compensation claim file was not excepted from required public disclosure under section 3(a)(1) of the Open Records Act as it was not deemed confidential by law. The court noted that in the absence of a statute specifically making records confidential, the records could not be made confidential by an agency rule promulgated under general agency rulemaking powers. Under its general rulemaking authority, the Industrial Accident Board had promulgated an agency rule that made information in a claimant's file confidential.¹ The supreme court rejected the board's contention that the agency rule making the information confidential operated "to deem the information confidential by law" for purposes of 3(a)(1) on the grounds that to allow an agency to deem information confidential by rulemaking would be to allow any agency to effectively circumvent the Open Records Act via agency rule, exempting the agency and information held by it from the act's coverage, which would effectively eviscerate the purposes of the Act. An agency must have express statutory authority to promulgate rules to close records. Industrial Foundation, supra, at 677.

The court excepted from disclosure information in a worker's compensation file only if it fell within the ambit of a common-law right of privacy, as previously recognized

1. Rule 9.040 read as follows: "As a prerequisite for approval of a request for a record check or for the furnishing of information on a claimant, there must be a workmen's compensation claim for the named claimant open or pending before this Board or on appeal to a court of competent jurisdiction from the Board at the time the record search request or request for information is presented to this Board. The first, middle and last name of the claimant, age and social security number, and if possible, dates of injury and the name of prior employers must be given in request for information. The Board will furnish the requested information or a record check only to the following: (1) the claimant; (2) the attorney for the claimant; (3) the carrier; (4) the employer at the time of the current injury; (5) third party litigants. Fees and charges for record requests may be obtained from the Industrial Accident Board." (Promulgated 1961, revised 1974.) Industrial Foundation, supra, at 676 n.10.

by the court in Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973). In order to be excepted from disclosure under common-law privacy rights recognized in section 3(a)(1), the information must consist of highly embarrassing or intimate facts about a person's private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities and be of no legitimate concern to the public. Industrial Foundation, supra, at 683; see Billings, supra.

While recognizing that the board promulgated its confidentiality rule to protect the identity of claimants because there was concern about possible discrimination by employers against individuals who file claims, the supreme court held that, except for the nature of only certain injuries (e.g., to the sexual organs, those stemming from pregnancy due to contraceptive failure, attempted suicide, mental disorders, etc.), the information contained in workers' compensation claim files did not meet the common-law criteria the court articulated. Therefore, release of the information in the file, including the claimant's name, social security number, the nature of injury and the names of the claimant's employer and attorney, was not protected. In 1975, the 64th Legislature attempted to specifically exempt claims filed with the Industrial Accident Board from the Open Records Act. In that legislative session, Senate Bill 496 was introduced and passed to engrossment in the Senate, but was never presented for final passage by the Senate and so died at the end of the session. The 65th Legislature in 1977, in enacting section 9a of article 8307, adopted verbatim the wording of the board's prior rule which the supreme court found did not constitute a "law" deeming information confidential for purposes of justifying the withholding of information from the public under the Open Records Act. See Sartwelle, Workers' Compensation, 32 Sw. L.J. 291, 301 (1974).

Section 9a, a response to the Industrial Foundation decision and to Open Records Decision No. 8, was clearly intended to deem confidential all information contained in workers' compensation files held by the Industrial Accident Board. This discussion does not, however, resolve the question of whether section 9a may be more broadly construed to deem confidential the information contained in the report of first injury filed by a city or other public employer when that information is requested not from the Industrial Accident Board but from the agency generating the report.

In Open Records Decision No. 260 (1980), this office held that information relating to a worker's compensation claim contained in the personnel file of a city employee, including information regarding the employee's prior injuries, safety review board accident sheets, and personnel status change sheets, all of which related to the employee's worker's compensation claim, were not confidential under constitutional or common-law privacy rights protected by section 3(a)(1), nor by employee privacy rights protected by section 3(a)(2). The clear import of the confidentiality requirements of section 9a is that these provisions apply only to the Industrial Accident Board and entities that have acquired information from the board pursuant to the statute, but they do not apply to entities, such as the city here, which possess the information in their own right. The statute addresses the requirements for obtaining information from the Industrial Accident Board and delineates the circumstances under which information in workers' compensation files may be disclosed by the board. It does not purport to render confidential the information concerning a claimant file that is held by other entities that have not acquired the information from the board.

Section 9a(b) lists the individuals and entities to which the Industrial Accident Board may provide requested information upon proper application. The enumerated individuals or entities include the claimant, the claimant's attorney, the carrier, the employer "at the time of the current injury," third-party litigants, the State Board of Insurance, and the Texas Department of Human Services. Section 9a(m) provides that information in workers' compensation files retains its confidential character when released to any investigative, legislative, or law enforcement agency. Section 9a(m) further provides that

[a]ny individual who shall publish, disclose, or distribute any such confidential information which is possessed by any investigative, legislative, or law enforcement agency to any other individual, corporation, or association not entitled to have received such information directly from the Industrial Accident Board under the provisions of this law commits an offense, and any person, corporation, or association who receives any such confidential information when such person was not entitled to have received the same from the Industrial Accident Board under the

provisions of this law commits an offense. . . . This subsection does not prohibit an employer from releasing information about a former employee to another employer with whom the employee has made application for employment, provided such information was lawfully acquired by the employer releasing the same.

Under the provisions of article 8307, section 9a, the report of first injury or illness in a worker's compensation claim -- indeed, all information in a worker's compensation file held by the Industrial Accident Board -- is deemed confidential and may not be released by the Industrial Accident Board or by anyone else who has lawfully acquired the information, except as provided in article 8307, section 9a. The statute contemplates acquisition of the information from the board and prohibits further dissemination by an agency, person or entity that has acquired the information from the board. Here, the city did not acquire the information from the board, but rather furnished the information to the board. Therefore, the city is not, in this instance, within the coverage of the confidentiality rule. Other decisions of this office dealing with workers' compensation claim information address the situation in which information is held by the board, as opposed to other agencies or entities. See Attorney General Opinions JM-966 (1988) (section 9a of article 8307 prohibits the Industrial Accident Board from disclosing confidential worker claim files to employees of the Texas Rehabilitation Commission); MW-202 (1980) (Industrial Accident Board may not divulge any information other than non-identifying statistical information in any worker's compensation claim file to state or federal agencies unless board determines fraud exists with respect to such claims and those agencies are the appropriate ones to prosecute or discipline wrongdoers); cf. Letter Opinion 88-74 (1988) (legislative committee may enter into consulting contract with private corporation requiring use of claimant information if corporation is duly authorized agent for the committee and identities of claimants remain confidential.)

The fact that the legislature adopted verbatim the rule promulgated by the board supports the conclusion that the applicability of the confidentiality provision of section 9a is limited to the board, inasmuch as the board could not purport to enact rules governing any agency other than itself. The legislative intent behind enactment of the

rule appears to be coextensive with the rulemaking power of the board, since a broader application of the confidentiality rule could have been expressly included in the legislative enactment. That no such broadening of the scope of the statute was undertaken suggests that none was intended. Therefore, information in a worker's compensation claim file held by the Industrial Accident Board is deemed confidential by law, but information in a worker's compensation claim file held by a public employer, who is covered by the Open Records Act, falls outside the scope of section 9a if it comprises information not obtained from the board, and is not therefore protected per se by statute from public disclosure. The information may be withheld from public disclosure only if it is protected by a common-law or constitutional right of privacy under section 3(a)(1) or by an employee privacy right under section 3(a)(2). None of the information on the first injury report you have submitted implicates either of these privacy rights.

You also claim that the information sought is protected from required public disclosure under section 3(a)(3). Section 3(a)(3), known as the litigation exception, excepts from required public disclosure

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

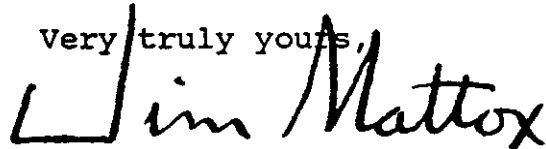
To claim section 3(a)(3) the governmental body must show: 1) that litigation is actually pending or reasonably anticipated, and 2) that the information in question relates to the litigation such that withholding it is necessary to preserve the governmental body's strategy or legal interests in the litigation. Open Records Decision No. 478 (1987); see Open Records Decision Nos. 416 (1984); 180 (1977); 135 (1976). You submitted a letter from an attorney indicating his intention to seek damages for his client, who is the subject of the first report of injury, from the Cameron County Drug Task Force. Although this letter supports the conclusion that litigation may be reasonably anticipated,

you have not shown how the report of first injury would relate to any litigation such that withholding it would be necessary in order to preserve the city's legal interest in any such litigation. Therefore, the report may not be withheld under section 3(a)(3).

S U M M A R Y

Section 9a of article 8307, V.T.C.S., does not protect workers' compensation claim reports from required public disclosure under article 6252-17a, V.T.C.S., unless the information was obtained from the Industrial Accident Board or is otherwise protected by a common-law, constitutional or employee privacy right.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, stylized "J" and "M".

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